Filed 10/20/17 P. v. Mize CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. DENNIS WAYNE MIZE, Defendant and Appellant.	C082928 (Super. Ct. No. MCYKCRBF201112632)

Defendant Dennis Wayne Mize appeals from the trial court's order denying his Penal Code section 1170.18 petition for resentencing on his prior prison term enhancement. [1] He contends the trial court should have stricken the prison prior because the felony underlying the enhancement had subsequently been reduced to a misdemeanor pursuant to section 1170.18. We find that reducing the underlying felony to a misdemeanor does not require elimination of a previously-imposed enhancement that was supported by the felony. We shall therefore affirm the trial court's order.

---

[1] Undesignated statutory references are to the Penal Code.

I. BACKGROUND

We dispense with the facts of defendant's crimes as they are unnecessary to resolve this appeal.

On July 11, 2012, defendant pleaded no contest in this case to stalking while subject to a temporary restraining order (§ 646.9, subds. (a), (b)) and disobeying a domestic relations order (§ 273.6, subd. (a)), and admitted four prior prison term allegations (§ 667.5, subd. (b)) with the two oldest prison priors treated as a single commitment. On January 8, 2014, defendant was sentenced in this case and two unrelated cases to a 10-year eight-month state prison term.

The felonies underlying two of the prison priors, convictions in Shasta County for petty theft with a prior (§ 666) in case No. 02F1303 and second degree burglary (§ 459) in case No. 99F1821, were reduced to misdemeanors pursuant to section 1170.18 in January 2016.

On February 23, 2016, defendant filed a section 1170.18 petition to strike the prison prior based on the Shasta County petty theft with a prior conviction. The trial court denied the petition. Defendant appeals.

II. DISCUSSION

The passage of Proposition 47, the Safe Neighborhoods and Schools Act (the Act), created section 1170.18, which provides in pertinent part: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) "A felony conviction that is recalled and resentenced under subdivision (b) or designated

as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k) (subdivision (k)).) Since the prior prison term enhancement requires that defendant be convicted of a felony and have served a prison term for that conviction (§ 667.5, subd. (b)), a question exists whether a prior prison term enhancement can remain in place when the felony on which it was based is subsequently reduced to a misdemeanor after the enhancement was imposed.[2]

Defendant claims that the trial court erred in not striking the prison prior.

We begin by noting that while section 1170.18 allows felony convictions to be reduced to misdemeanors, even when the felony sentence was completed before the passage of the Act, it does not mean the conviction should be viewed as a misdemeanor retroactively. Subdivision (k) was interpreted in the context of felony jurisdiction over criminal appeals in *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*). *Rivera* found that subdivision (k), which parallels the language from section 17 regarding the reduction of wobblers to misdemeanors,[3] should be interpreted in the same way as being prospective, from that point on, and not for retroactive purposes. (*Rivera, supra,* at p. 1100; see also *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [rejecting assertion

---

[2] This issue is currently before the California Supreme Court. (See, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011.)

[3] Section 17, subdivision (b) states in pertinent part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances . . . ."

that assisting a second degree burglary after the fact does not establish the necessary element of the commission of an underlying felony because the offense is a wobbler: "Even if the perpetrator was subsequently convicted and given a misdemeanor sentence, the misdemeanant status would not be given retroactive effect"].) The court in *Rivera* accordingly concluded that the felony status of an offense charged as a felony did not change after the Act was passed, thereby conferring jurisdiction on the Court of Appeal. (*Rivera, supra,* at pp. 1094-1095, 1099-1101.) We see no reason to depart from *Rivera*. Although *Rivera* addressed subdivision (k) in a different context, its analysis of subdivision (k) is equally relevant here.

Relying primarily on *People v. Park* (2013) 56 Cal.4th 782 (*Park*) and *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*), defendant asserts that the text of subdivision (k) requires striking the prison prior.

In *Park*, the Supreme Court held that a felony conviction properly reduced to a misdemeanor under section 17, subdivision (b) could not *subsequently* be used to support an enhancement under section 667, subdivision (a). (*Park, supra,* 56 Cal.4th at p. 798.) Allowing the reduction to eliminate an enhancement imposed before the felony was reduced would be an impermissible retroactive application, under both section 17 and the Act. The distinction between retroactive and prospective application was recognized by the Supreme Court in *Park*. "There is no dispute that, under the rule in [prior California Supreme Court] cases, [the] defendant would be subject to the section 667[, subdivision] (a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Park, supra,* at p. 802.) In the case before us, defendant received the contested enhancement before his prior convictions could be reduced to a misdemeanor. Allowing the subsequent reduction of those felonies to eliminate an earlier enhancement for having served a prior prison term would be an impermissible retroactive application of the Act.

Park is not the only example of the Supreme Court finding that reducing a felony to a misdemeanor pursuant to section 17 is not applied retroactively. For example, if a defendant is convicted of a wobbler and is placed on probation without imposition of sentence, the crime is considered a felony "unless subsequently 'reduced to a misdemeanor by the sentencing court' pursuant to section 17, subdivision (b)." (*People v. Feyrer* (2010) 48 Cal.4th 426, 438-439 (*Feyrer*).) "If ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively." (*Id.* at p. 439.) It has therefore long been the rule regarding section 17 that "as applied to a crime which is punishable either as felony or as misdemeanor: 'the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive effect.' " (*People v. Banks* (1959) 53 Cal.2d 370, 381-382, quoting *Doble v. Superior Court* (1925) 197 Cal. 556, 576-577 (*Doble*).)

Defendant seeks to distinguish section 17 from subdivision (k). He notes that under section 17, when a crime is punishable as a misdemeanor or felony it is a "misdemeanor for all purposes" under various conditions including "[a]fter a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170." (§ 17, subd. (b), (b)(1).) Relying on *Doble*, defendant contends that those terms are key to understanding why section 17 is not given retroactive effect. Since subdivision (k) does not use terms like "after" or "when" to describe the treatment of offenses designated as misdemeanors, he concludes that it is thereby distinguished from section 17, rendering inapposite the cases declining to give retroactive effect to section 17.

The defendant in *Doble* was charged with various crimes including six offenses punishable as misdemeanors or felonies. (*Doble, supra*, 197 Cal. at pp. 557-558.) At that time, the statute of limitations for all misdemeanors was one year. (*Id.* at p. 558.)

Since the defendant was charged more than a year after the offenses, he contended that prosecution was barred. (*Ibid*.) The Supreme Court addressed an argument that the "for all purposes" language of section 17 would bar prosecution because a misdemeanor judgment would be given both prospective and retroactive effect. (*Doble, supra,* at p. 575.) The Supreme Court rejected this reasoning, as it "ignores the language—'after a judgment imposing a punishment other than imprisonment in the state prison'—following the phrase 'shall be deemed a misdemeanor for all purposes.' " (*Id*. at p. 576.) The high court held: "A fair construction of section 17, in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section, the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive effect so far as the statute of limitations is concerned." (*Id.* at pp. 576-577.)

Although the Supreme Court gave effect to the term "after" in *Doble*, that term is not necessary to preclude giving retroactive effect to the phrase "for all purposes." The term "after" is used only in the provision of section 17 addressing an initial misdemeanor sentence, section 17, subdivision (b)(1). More analogous to subdivision (k) is section 17, subdivision (b)(3). Under this provision, a felony conviction will be treated as a "misdemeanor for all purposes" (§ 17, subd. (b)) when "the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor" (§ 17, subd. (b)(3)). This provision was at issue in *Feyrer* and *Park*, and, as previously stated, was not given retroactive effect in those cases. (See *Feyrer, supra*, 48 Cal.4th at p. 439; *Park, supra*, 56 Cal.4th at pp. 787, 802.) Subdivision (k) operates in the same manner, treating a felony conviction as a felony until it is reduced to a misdemeanor under section 1170.18. "A felony conviction that is

recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k).) Consistent with the language of subdivision (k), a felony subject to Proposition 47 remains a felony *until* it is reduced to a misdemeanor pursuant to section 1170.18. As with section 17, subdivision (b)(3), reducing the felony to a misdemeanor pursuant to section 1170.18 is not given retroactive effect.

Defendant's reliance on *Flores* is similarly misplaced. The defendant in *Flores* was sentenced to prison following his conviction of selling heroin (Health & Saf. Code, § 11352), and his state prison sentence for that crime was enhanced by one year under section 667.5, subdivision (b). (*Flores, supra*, 92 Cal.App.3d at pp. 464, 470.) The enhancement was based on a prior felony conviction of possession of marijuana under Health and Safety Code section 11357. (*Flores*, *supra*, at p. 470.) That statute had since been amended in 1975 to make possession of marijuana a misdemeanor. (*Id.* at p. 471.)

The *Flores* court noted that in 1976 the Legislature enacted Health and Safety Code section 11361.5, subdivision (b), which "authorize[d] the superior court, on petition, to order the destruction of all records of arrests and convictions for possession of marijuana, held by any court or state or local agency and occurring prior to January 1, 1976." (*Flores, supra*, 92 Cal.App.3d at p. 471.) Also in 1976, Health and Safety Code section 11361.7 "was added to provide in pertinent part that: '(a) Any record subject to destruction . . . pursuant to Section 11361.5, or more than two years of age, or a record of a conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 which became final more than two years previously, shall not be considered to be accurate, relevant, timely, or complete for any purposes by any agency or person . . . . (b) No public agency shall alter, amend, assess, condition, deny, limit, postpone, qualify, revoke,

surcharge, or suspend any certificate, franchise, incident, interest, license, opportunity, permit, privilege, right, or title of any person because of an arrest or conviction for an offense specified in subdivision (a) or (b) of Section 11361.5 . . . on or after the date the records . . . are required to be destroyed . . . or two years from the date of such conviction . . . with respect to . . . convictions occurring prior to January 1, 1976.' " (*Flores, supra*, at pp. 471-472, italics omitted.) Based on these amendments, the court concluded that "the Legislature intended to prohibit the use of the specified records for the purpose of imposing any collateral sanctions," such as the prior prison term enhancement. (*Id.* at p. 472.) *Flores* is inapposite because there is no similar declaration of legislative intent for full retroactivity either in the Act generally or section 1170.18 in particular.

Defendant's claims based on the canons of statutory construction fare no better. Citing the maxim *expressio unius est exclusio alterius*, "under which 'the enumeration of things to which a statute applies is presumed to exclude things not mentioned,' " (see *Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 90) defendant claims that "by explicitly carving out an exception for firearm-possession to treatment of the felony conviction as a misdemeanor upon redesignation of the conviction pursuant to Proposition 47, the electorate signaled its intention to treat the conviction as a misdemeanor for purposes of prior prison term enhancements."

The expression of a limitation on how the misdemeanor designation applies once it has been established, however, does not clearly and compellingly imply that the electorate thereby intended to place no limitation on when the designation applies in the continuum of time. This is particularly true where, as here, the same language was held by the Supreme Court not to apply retroactively. The Act's retroactivity is addressed in subdivision (a) of section 1170.18, which lists the provisions subject to the Act's retroactive application. Notably absent from that list is the prior prison term enhancement. As with his contentions regarding *Park*, this particular argument of defendant's actually supports a contrary interpretation of the Act.

Defendant's reliance on the Act's broad purpose "to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and [to] support programs in K-12 schools, victim services, and mental health and drug treatment" (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70), as well as its provision for liberal interpretation (*id.* at § 18, p. 74), is also misplaced.

"[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." ' " (*Rodriguez v. United States* (1987) 480 U.S. 522, 525-526 [94 L.Ed.2d 533, 538]; accord *County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48.) This is true even where legislation calls for "liberal construction." (See, e.g., *Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1510 [workers' compensation law].) The essence of lawmaking is the choice of deciding to what extent a particular objective outweighs any competing values, and a court in the guise of interpretation should not upset this balance where it is spelled out in the text of a statute. (*County of Sonoma v. Cohen, supra,* at p. 48.) The statements of purpose in the Act cannot be invoked to create a retroactive application that the text of the Act does not support.

Defendant's citation to the rule of lenity, "whereby courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor" (*People v. Avery* (2002) 27 Cal.4th 49, 57), is inapplicable here because its application is premised on an

ambiguity that is not present in this part of the Act. " 'The rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable.' [¶] Thus, although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*People v. Avery, supra,* at p. 58.)

Defendant's final argument is that the Act should be applied to negate his prison prior so to avoid difficult constitutional questions (see *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373 ["we have repeatedly construed penal laws, including laws enacted by initiative, in a manner that avoids serious constitutional questions"]) fails because our construction does not raise any serious constitutional questions. He claims that not applying the Act retroactively to his prison priors raises serious equal protection issues. Not so.

Whether a legislative body can limit the retroactive application of a change in the law reducing punishment for crime is a settled question. "[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 [55 L.Ed. 561, 563].) This also applies to changes in sentencing law that benefit defendants. "Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim—including this court." (*People v. Floyd* (2003) 31 Cal.4th 179, 188.)

As with his other arguments, defendant's reliance on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) is misplaced. The Supreme Court held in *Kapperman* that a change in the law giving presentence credit for felons transferred to prison after a certain

date could not be applied prospectively because it did not serve "a rational and legitimate state interest." (*Id*. at pp. 546, 550.) *Kapperman* "does not stand for the broad proposition that equal protection principles require that all persons who commit the same offense receive the same punishment or treatment without regard to the date of their misconduct." (*Baker v. Superior Court* (1984) 35 Cal.3d 663, 669.) As this court stated, "[t]he *Kapperman* court took pains to point out its decision did not apply to laws reducing punishment for crimes. 'Initially, we point out that this case is not governed by cases [citation] involving the application to previously convicted offenders of statutes lessening the *punishment* for a particular offense. The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written. [Citation.]' [Citation.] Therefore, *Kapperman* does not prevent the prospective application of a statute reducing punishment for a crime." (*People v. Lynch* (2012) 209 Cal.App.4th 353, 360.)

A statute that "substantially changes the legal consequences of past events" is not applied retroactively absent clear legislative intent to do so. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.) There is no evidence of a legislative intent to apply subdivision (k) retroactively. This is particularly true where, as here, the closely analogous language in section 17 has not been given a retroactive application. "Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears." (*Estate of Griswold* (2001) 25 Cal.4th 904, 915-916.) "Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source." (*In re Harris* (1989) 49 Cal.3d 131, 136.)

The trial court correctly denied defendant's petition.

III. DISPOSITION

The judgment (order) is affirmed.

/S/

RENNER, J.

We concur:

/S/

BUTZ, Acting P. J.

/S/

MURRAY, J.